RECENT DECISIONS.

ADMINISTRATIVE LAW—GOVERNOR'S RIGHT TO SUE.—A State prison board entered into a contract involving the labor of convicts. The governor and the attorney-general, both members of the board, differed as to the constitutionality of the contract. Upon the refusal of the attorney to act, the governor sought to restrain the board from performing. *Held*, the governor could not institute suit in behalf of the State. *Henry* v. *The State* (Miss. 1906) 39 So. 856. See NOTES, p. 456.

ADMINISTRATIVE LAW—LAW OF OFFICERS—CHANGE OF TERM.—Under constitutional provision allowing the legislature to provide for the election of such county and township officers as might be necessary, the legislature of Nebraska established the office of Register of Deeds, election for which was to be held every four years. As part of a plan to provide for biennial instead of annual elections, the legislature subsequently provided that the term of the officers then holding be extended from four to five years. *Held*, the extension of the term was unconstitutional. *State* v. *Plasters* (Neb. 1905) 105 N. W. 1092.

It is well settled that the legislature cannot change the term of office if it is determined by the constitution. *State* v. *Thoman* (1872) 10 Kan. 191. But, although a statutory extension of the term of a then incumbent, whose office has been made elective by the constitution is ordinarily void, *People* v. *Bull* (1871) 46 N. Y. 57, yet if such extension is made to secure uniformity of official terms and is reasonable it is usually held constitutional. *Wilson* v. *Clark* (1901) 63 Kan. 505, an extension of one year; *State* v. *Ransom* (1880) 73 Mo. 89, of two years. The principal case is therefore against the weight of authority and seems unnecessarily careful of constitutional rights.

ADMINISTRATIVE LAW—MANDAMUS—CONTROL OF GOVERNOR.—A State statute directed the Governor to approve with his own signature treasury warrants for the salaries of certain military officers. The petitioners allege that they are within the statute, and that the governor has refused to sign the warrants for their salaries as directed. *Held*, Mandamus would be issued to the governor. *Cochron* v. *Beckham* (Ky. 1905) 89 S. W. 262. See NOTES, p. 453.

BANKRUPTCY—REFEREE'S RIGHT TO GRANT AN INJUNCTION.—A trustee in bankruptcy claimed that a sale of standing timber was made by the bankrupt with intent to defraud creditors. The parties submitted the question to a referee, who enjoined the vendee from cutting and removing the timber. *Held*, although the power of injunction of a referee in bankruptcy is not clearly established, his injunction in a cause submitted by the parties is equivalent to one by the court following a referee's finding and will be confirmed. *In re Benjamin* (1905) 140 Fed. 320.

Referees in bankruptcy by the Act of 1898 are vested with such powers of the district courts, except in regard to applications for composition and discharge, as have not been taken away or limited by the district courts and the general orders of the supreme court. *In re Horcke* (1901) 107 Fed. 241; Collier, Bankruptcy, 4th ed., 300. Obviously, therefore, except where the power of injunction is taken away by rule, *In re Siehert* (1904) 133 Fed. 781, or by the general orders, Gen. Order 12, the referee should have power to grant an injunction, Collier, Bankruptcy, 4th ed., 128, though, it is believed, only when expressly authorized by the district court. The courts, as in the principal case, have refused to pass upon this question and base their decisions on jurisdiction by the consent of the parties. *In re Steuer* (1900) 104 Fed. 976. But it is difficult to see how jurisdiction is obtained unless the referee had jurisdiction.

CARRIERS—SIDETRACK FACILITIES—DUTY TO REFRAIN FROM DISCRIMINATION IN PROVIDING.—The complainant was the owner and operator of a coal mine in West Virginia. The defendant had provided sidetracks to other coal mine operators in substantially similar circumstances with those in which the complainant was, but refused to provide such facilities to the complainant, with the result that the complainant was being driven out of business. *Held*, this was unjust discrimination under Section 3 of the Interstate Commerce Act, and that an order should issue prohibiting further violation of the act. *Red Rock Fuel Co.* v. *Baltimore & Ohio Railroad Co.* (1905) 11 Interst. Com. Rep. 438. See NOTES, p. 451.

CONFLICT OF LAWS—GARNISHMENT OF DEBT—FOREIGN CORPORATIONS.—The plaintiff, a resident of West Virginia, was a creditor of a resident of Pennsylvania to whom a Maryland corporation, doing business in West Virginia, owed a debt contracted and payable in Pennsylvania. The plaintiff brought garnishment proceedings against the corporation. The principal defendant did not appear. *Held*, that garnishment would lie. *B. and O. R. R. Co.* v. *Allen* (W. Va. 1905) 52 S. E. 465.

To be recognized as between the several States a judgment in rem must be restricted to property previously brought within the territorial limits of the court; a judgment in personam must be based on personal service in the jurisdiction or a voluntary appearance. *Pennoyer* v. *Neff* (1877) 95 U. S. 714. In applying these principles to garnishment proceedings some courts have followed the doctrine of taxation, *State Tax on Foreign-Held Bonds* (1872) 15 Wall. 300, and have held that a debt has its situs only with the creditor. *Mo. Pac. R. R.* v. *Sharitt* (1890) 43 Kan. 375; *Central Trust Co.* v. *C. R. C. R. R.* (1895) 68 Fed. 685. Since, however, considerations of the situs of the debt are artificial, *Chicago etc. R. R.* v. *Sturm* (1899) 174 U. S. 710, the true rule is that wherever the corporation can be served with process it should be liable as garnishee, *Mooney* v. *Buford* (1896) 72 Fed. 32; *Nat'l. Ins. Co.* v. *Chambers* (1895) 53 N. J. Eq. 468; 3 COLUMBIA LAW REVIEW 417; 5 id. 436, and the principal case is unnecessarily restrictive in limiting garnishment to corporations which are domestic for all purposes except suit in federal courts.

CONSTITUTIONAL LAW—APPROPRIATIONS FOR PRIVATE PURPOSE—SUGAR BOUNTIES.—The plaintiffs, manufacturers of sugar from beets, sued the State for bounties claimed to be due under a statute offering a bounty for the manufacture of sugar and chicory. *Held*, the act was unconstitutional, and the fact that the manufacturers had paid the producers larger prices for beets, relying for remuneration upon this statute, did not create an obligation against the State. *Oxnard Beet Sugar Co.* v. *State* (Neb. 1905) 105 N. W. 716.

It is fundamental that the legislature cannot appropriate public funds for private purposes, *Loan Association* v. *Topeka* (1874) 20 Wall. 655; Cooley, Const. Lim. 696 ff., and, even though there is an incidental public benefit, where the primary purpose is to encourage or establish private enterprises, the appropriation is not justified. *Loan Association* v. *Topeka*, supra; *Cole* v. *La Grange* (1884) 113 U. S. 1; *Lowell* v. *Boston* (1873) 111 Mass. 454; *State* v. *Osawkee* (Kans. 1875) 19 Am. Rep. 99. Hence the act in the principal case was properly declared void. See *Michigan Sugar Co.* v. *Auditor General* (1900) 124 Mich. 674. And, since the legislature should not be allowed to do indirectly what it cannot do directly, it would seem that the State should be under no obligation to reimburse the manufacturers for money expended in reliance upon the statute. See *Michigan Sugar Co.* v. *Auditor General*, supra; but see *United States* v. *Realty Co.* (1895) 163 U. S. 427. The principal case is in accord, on all points, with the view previously expressed in 2 COLUMBIA LAW REVIEW 525, which gives a full discussion of this question.

CONSTITUTIONAL LAW—FULL FAITH AND CREDIT—DECREES OF DIVORCE.—The defendant, after being married in New York, deserted his wife and moved to Connecticut, where he obtained a domicil and secured a divorce a vinculo, upon service by publication, the wife not being personally served with process and not appearing in the action. The wife, having retained her domicil in New York, sued in that State for a separation. *Held*, the court was not bound to give full faith and credit to the Connecticut decree. *Haddock* v. *Haddock* (1906) 26 Sup. Ct. 525. See NOTES, p. 449.

CONSTITUTIONAL LAW—VACATION OF A JUDGMENT OF NATURALIZATION—STATE AS A PARTY.—The County Court at the suit of the State annulled a judgment conferring citizenship previously granted by it. *Held*, the State was not a proper party to attack the judgment. *Peterson* v. *State* (Tex. 1905) 89 S. W. 81. See NOTES, p. 460.

CONTRACTS—BENEFICIARIES' RIGHTS IN NEW YORK.—In consideration for franchises granted by the village of Pelham Manor the defendant contracted to furnish water to the inhabitants of the village at a certain maximum rate. The defendant threatened to raise the rate in excess of the agreed maximum. *Held*, the plaintiff, an inhabitant of the village, was entitled to an injunction as a beneficiary under the contract. *Pond* v. *New Rochelle Water Co.* (1906) 183 N. Y. 330.

The court relied chiefly on the doctrine of *Dutton* v. *Poole* (1679) 1 Ventris 318, 332, which it referred to as "the leading case in England," although the theory of blood relationship upon which that case was decided has long been overruled in England. *Tweedle* v. *Atkinson* (1861) 1 B. & S. 393. While it is still law in New York, this doctrine has no application to the facts in the principal case. The court conceded that no domestic tie was discoverable, but could see no distinction in principle, since "it cannot be said that the contract was made for the benefit of a stranger." The case overrules a long line of decisions which have hitherto limited the recovery by beneficiaries in New York to cases involving the exact facts of the unfortunate early precedents, namely, of near relationship, and contracts to discharge a specific debt or duty due the beneficiary from the promisee. *Durnherr* v. *Rau* (1892) 135 N. Y. 219; *Wainwright* v. *Queens Co. Water Co.* (1894) 78 Hun 146; *Wait* v. *Wilson* (1903) 86 App. Div. 485.

CORPORATIONS—BANKS—LIABILITY OF DIRECTORS FOR CONCEALMENT OF INSOLVENCY.—The plaintiff became surety on the bond of a bank designated as depositary of county funds. The defendant director knew the bank was insolvent at the time he voted to accept the plaintiff as surety. The plaintiff after paying the county's loss sued the defendant in deceit. *Held*, the defendant was not liable to creditors for his silence as to the insolvency of the bank. *Hart* v. *Evanson* (N. D. 1905) 105 N. W. 942.

The court in repudiating the theory that directors of an insolvent corporation are trustees for creditors are in line with the weight of authority. Clark and Marshall, Corporations, §§ 767, 768. It is well settled, however, that an officer is liable in deceit for affirmative misrepresentations as to solvency. *Cullen* v. *Thomson's Trustees* (1862) 4 Macq. 424; *Craigie* v. *Hadley* (1885) 99 N. Y. 131. Since keeping open a hopelessly insolvent bank amounts to a representation of solvency to depositors, *Higgins* v. *Hayden* (1897) 53 Neb. 61, making a managing officer liable in deceit, *St. Louis, etc. R. R. Co.* v. *Johnson* (1889) 133 U. S. 566, it would seem, in the case of a surety also, concealment of hopeless insolvency by a managing director would be fraud. Cf. note 33 Am. Dec. 707. The principal case is, therefore, unsound.

CORPORATIONS—NATIONAL BANKS—DEALING IN STOCKS.—A national bank held a debt against an insolvent corporation and took in satisfaction

stock of a new company which it helped to organize and which was incorporated primarily to buy and sell the stock of the insolvent company. *Held*, two justices dissenting, its act was ultra vires as amounting to a dealing in stocks. *First Nat. Bank* v. *Converse* (1906) 26 Sup. Ct. 306.

Although it is a general rule that a national bank cannot deal in stocks of other corporations, *California Bank* v. *Kennedy* (1897) 167 U. S. 362, it may, as incidental to the transaction of the banking business, accept stocks as collateral for a loan, *Nat. Bank* v. *Case* (1878) 99 U. S. 628, or to effect a compromise of a contested claim, *First Nat. Bank* v. *Nat. Exch. Bank* (1875) 92 U. S. 122, or in payment of a doubtful debt. *First Nat. Bank* v. *Nat. Exch. Bank*, supra, semble; see *Holmes Mfg. Co.* v. *Holmes Metal Co.* (1891) 127 N. Y. 230. The court in the principal case seem to consider that the circumstances of the transaction constituted it a speculative venture. However, since it does not appear that there was any other way of obtaining payment, and since a corporation may take stocks of other corporations as necessary means to the exercise of any of its granted powers, *Hill* v. *Mishet* (1884) 100 Ind. 341, 349; *Holmes Mfg. Co.* v. *Holmes Metal Co.*, supra, the principal case is unsound.

CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDERS—CONFLICT OF LAWS.—The plaintiff, a creditor of a Maryland corporation, brought suit against the defendant, a stockholder in the Maryland corporation, but a resident of New York, to enforce the statutory liability of the defendant under the Maryland laws making stockholders individually liable to creditors. *Held*, since the Maryland laws provided that the exclusive remedy for enforcing statutory rights against stockholders should be by a bill in equity in the nature of a creditor's bill, the plaintiff could not recover as a single creditor suing a single stockholder. *Knickerbocker Trust Co.* v. *Iselin* (1906) 35 N. Y. Law Jour. 485.

Where the stockholders of a corporation are made individually liable by statute for the debts of the corporation, this liability is usually enforceable in the courts of another State against individual stockholders. *Bank of North America* v. *Rindge* (1893) 57 Fed. 279; *Guerney* v. *Moore* (1895) 131 Mo. 650; *Whitman* v. *Oxford National Bank* (1900) 176 U. S. 559; Minor, Conflict of Laws, § 10. But since this liability is quasi-contractual rather than contractual, *McClaine* v. *Rankin* (1904) 197 U. S. 154; 5 COLUMBIA LAW REVIEW 606, it would seem that where the State creating the liability provides for a special remedy to enforce it, the liability is limited to this method of enforcement *Russell* v. *Railway Co.* (1896) 113 Cal. 258; *Bank* v. *Rindge* (1891) 154 Mass. 203; Minor, Conflict of Laws § 10; and see *Marshall* v. *Sherman* (1895) 148 N. Y. 9. Consequently, the court in the principal case properly refused the plaintiff a recovery in the form of action by which it was sought.

CORPORATIONS—ULTRA VIRES ACT—ALIENATION OF ENTIRE PROPERTY TO A MUNICIPALITY.—A gas company, incorporated to serve a certain municipality, under an ordinance whereby it obtained the privilege of using the city's streets, gave the city an option to purchase its entire plant. *Held*, the contract was void as beyond the powers of the company. *Quinby* v. *Consumer's Gas Trust Co.* (1905) 140 Fed. 362. See NOTES, p. 459.

CRIMINAL LAW—INFAMOUS PUNISHMENT—VIOLATION OF MUNICIPAL ORDINANCES.—A municipal charter authorized the punishment of offenses against the city's ordinances by confinement of the offender in the county chain gang where State prisoners were also sent. Such cases were summarily tried by magistrates. *Held*, the provision was unconstitutional because the offender was deprived of due process of law. *Pearson* v. *Wimbish* (Ga. 1906) 52 S. E. 751.

It is generally recognized that the formalities for criminal prosecution required by constitutional provisions are not necessary in the trial of petty

offenses, *Callan* v. *Wilson* (1888) 127 U. S. 540, as the violation of municipal ordinances. *Williams* v. *City Council* (1848) 4 Ga. 509; Dillon, Munic. Corp., §§ 432, 433. Where, however, infamous punishment is meted out, the offense is also regarded as infamous within the meaning of the constitutional provisions, *Ex parte Wilson* (1885) 114 U. S. 417, and it is held, therefore, that a crime punishable by State imprisonment, is not one of which a person can be summarily convicted. *Danner* v. *State* (1899) 89 Md. 220; *Jones* v. *Robbins* (Mass. 1857) 8 Gray 329. The Court in the principal case seems to consider that the mere fact, that the municipal offender was to be incarcerated with State prisoners, stamps the punishment as infamous; but the question would seem rather to be whether the institution to which the offender was sentenced had formerly been used exclusively for State prisoners and therefore had the character of infamy attached to it. *Jones* v. *Robbins*, supra, 139.

CRIMINAL LAW—SEPARATION OF JURY.—In a trial for larceny one of the jurors, accompanied by a bailiff, entered a saloon and there drank. No conversation was had or heard except that necessary to obtain the drink, and there were but two persons present. *Held*, the separation justified the granting of a new trial. *State* v. *Strodemier* (Wash. 1905) 83 Pac. 22.

A defendant's right to the seclusion of the jury is to secure him a verdict uninfluenced by outside tampering and pressure. *Commonwealth* v. *McCaul* (1812) 1 Va. Cas. 271; *State* v. *Cucuel* (1865) 19 N. Y. 549; *State* v. *May* (1892) 38 S. C. 333. By the weight of authority any real separation raises a presumption of improper influence, *State* v. *Prescott* (1834) 7 N. H. 287; *Daniel* v. *State* (1876) 56 Ga. 653; *State* v. *Murray* (1895) 126 Mo. 615, which the prosecution may rebut by showing that there could not have been, *King* v. *State* (1892) 91 Tenn. 617, or actually was not, *Drew* v. *State* (1889) 124 Ind. 9; *State* v. *Cucuel*, supra, any outside influence, *Commonwealth* v. *Roby* (1832) 12 Pick. 496, but which is not met if there remains any reasonable suspicion of abuse. *Commonwealth* v. *McCaul*, supra; *State* v. *O'Brien* (1862) 7 R. I. 336. Since it was shown in the principal case that no improper influence was or could be exerted, it is erroneously decided, especially since it has been repeatedly held that separation under continuous supervision of an officer is not, in contemplation of law, any separation at all. *State* v. *Cucuel*, supra; *State* v. *Jones* (1872) 7 Nev. 408; *Jenkins* v. *State* (1874) 41 Tex. 128.

DAMAGES—CONVERSION.—The plaintiff in Chicago consigned a carload of horses to A in Liverpool. The defendant as sheriff of Erie County seized them upon a warrant. In an action for conversion, *held*, the measure of damages was the market value of the horses at the place of destination at the time they would have arrived, less the cost of transportation and the cost in selling them there. *Wallingford* v. *Kaiser* (1906) 96 N. Y. Supp. 981.

The general rule of damages in this country in an action for conversion is the market value of the property at the time and place of conversion with interest to the time of trial. Sutherland on Damages, § 1109. Where property to be sold elsewhere is converted the above rule is applied, *Spicer* v. *Waters* (N. Y. 1866) 65 Barb. 227, and the mere fact that the goods are in transit, in the absence of other circumstances, would not seem to distinguish the case. In *Farwell* v. *Price* (1860) 30 Mo. 587, cited to support the principal case, a special rule of damages was applied because the defendants violated a fiduciary relation. The rule of damages laid down in the principal case, therefore, would not seem to be sound.

DOMESTIC RELATIONS—MARRIAGE PRESUMED FROM HABIT AND REPUTE—ESTOPPEL.—Deceased and complainant, having mutually agreed to live together as a married couple, kept house and were accepted by the community as husband and wife for twenty-five years until his death. The

absence of a ceremonial marriage, which by statute constituted the only valid marriage, was known only to themselves. Complainant claims as widow and sole distributee the proceeds of the estate of intestate. *Held*, that the personal representative of deceased was estopped to deny the rights of complainant. *Smith* v. *North Memphis Bank* (Tenn. 1905) 89 S. W. 392.

The principles of estoppel which forbid persons holding themselves out as married to defeat, by denying marriage, civil liabilities to third parties relying upon the representation, Greenleaf, Evidence, §§ 27, 207; *Divoll* v. *Leadbetter* (Mass. 1827) 4 Pick. 220, do not seem applicable in actions between the reputed husband and wife who are bound to know that their relation is illegal, especially where no misrepresentation nor detriment incurred therein is shown. *Robins* v. *Potter* (1868) 98 Mass. 532. Cf. *Andrews* v. *Ross* (1888) L. R. 14 P. D. 15; 1 Bishop, Marriage, Divorce and Sep. § 1150. However since under analogous circumstances a presumption of a subsequent legal marriage has been made, *Wilkinson* v. *Payne* (1791) 4 T. R. 468; *Johnson* v. *Johnson* (Tenn. 1860) 1 Cold. 626, the principal case though wrongly based on estoppel is sound in its conclusion. See Note 22 Am. Dec. 157.

DOMESTIC RELATIONS—PARENT'S RIGHT TO CUSTODY OF CHILDREN. The county court was authorized to commit to certain institutions for boys, any boy who was delinquent within the terms of an act defining a delinquent child as any child under sixteen years of age, who violates any law or ordinance, is incorrigible, knowingly associates with thieves, vicious or immoral persons, is growing up in idleness or crime, etc. Under this act the petitioner's son was committed to a home for boys during his minority, unless sooner discharged, evidence of his delinquency being the commission of indecent assaults (misdemeanors). Petitioner, in habeas corpus proceedings, disputed the constitutionality of this commitment by which he was deprived of the custody and services of his son. *Held*, that the father was illegally deprived of the custody of his son. *People* v. *McLain* (Ill. Sup. Ct. Dec. 20, 1905) 38 Chi. Leg. N. 166. See NOTES, p. 454.

EQUITY—DECREES ENFORCING FORFEITURES.—Complainant leased gas and oil rights to defendant, who neglected, after finding gas and oil, to develop production. The complainant thereupon filed a bill praying that the lease be cancelled under a forfeiture clause. *Held*, under such circumstances equity will enforce a forfeiture. *Brewster* v. *Lanyon Zinc Co.* (1905) 140 Fed. 801.

While equity will not enjoin a forfeiture at law when that is the most just remedy, *Hill* v. *Barclay* (1810) 16 Ves. 402; *Sheets* v. *Selden* (1868) 7 Wall. 416, yet it is stated in some cases that equity will never under any circumstances enforce a forfeiture. *Livingston* v. *Tompkins* (N. Y. 1820) 4 Johns. Ch. 415; *Marshall* v. *Vicksburg* (1872) 15 Wall. 146. Since, however, equity recognizes that in some instances forfeitures are justly enforceable at law, there seems to be no good reason why, when the forfeiture cannot be adequately enforced at law, equity should refuse to act. *R. R. Co.* v. *Ragsdale* (1876) 54 Miss. 200. Accordingly it has been held, when, as in the principal case, the lessee under the gas and oil lease is causing, by his laches, irreparable injury to the property owing to the migratory character of the substances, and the uncancelled lease would cast a cloud upon the lessor's title, that equity will enforce a forfeiture clause by causing the lease to be delivered up and cancelled. *Brown* v. *Vandergrift* (1875) 80 Pa. St. 142; *Gadbury* v. *Gas Co.* (1903) 162 Ind. 9; *Guffey Co.* v. *Oliver* (Texas 1904) 79 S. W. 884. Contra, *Harness* v. *Eastern Oil Co.* (1901) 49 W. Va. 232.

EVIDENCE—COMPETENCY OF WITNESSES—DIRECT INTEREST.—An action was brought by a married woman against the representative of a

deceased person to enforce the specific performance of a contract to sell land made with her by the deceased. Objection was made to the introduction of the husband of the plaintiff as a witness in her behalf on the ground that he had a direct legal interest in the result of the suit. *Held*, he was competent. *Hiskett* v. *Bogarth* (Neb. 1905) 105 N. W. 990.

A disqualifying interest must be a legal one as distinguished from a mere prejudice or bias arising from relationship. *Rudd's Case* (1775) Leach 110. And what has the appearance of a consequential benefit shall not repel a witness's testimony, *King* v. *Bray* (1737) Lee's K. B. 358, but the interest must be present, certain, and vested. *Smith* v. *Blackham* (1698) 1 Salk. 283, holding an heir at law may be a witness in support of the claim of his ancestor, but that a remainderman is not competent. The witness must be a gainer or loser by the event of the suit. *Bent* v. *Baker* (1789) 3 T. R. 27. Therefore since the husband's right to curtesy, defeasible by statute by a conveyance of the wife alone, is a mere contingency in contrast to the indefeasible dower interest of the wife in her husband's real property, the decision of the principal case is sound.

EVIDENCE—JUDICIAL NOTICE—RECORDS OF THE TRIAL COURT IN OTHER CASES.—In an action by the receiver of an insurance company, the lower court took judicial notice of its decree in a distinct case, crediting the plaintiff's company with assessments against the defendant. *Held*, reversible error. *Allison* v. *Fidelity Co.* (Neb. 1905) 104 N. W. 753.

While the courts uniformly take judicial notice of facts in different proceedings in the same action, *State* v. *Bower* (1876) 16 Kan. 475, they are divided as to whether a judge can take judicial notice in one action of proceedings in another in the same trial court. *State* v. *Jackson* (1883) 35 La. Ann. 769; *Streeter* v. *Streeter* (1867) 43 Ill. 155. Accordingly, the upper courts have upheld the lower tribunal in its refusal to take judicial notice of such other actions, *Anderson* v. *Cecil* (1897) 86 Md. 490, and have refused to reverse a judgment based solely on such notice. *Daniel* v. *Bellamy* (1884) 91 N. C. 78. Contra, *Crawford* v. *Duckworth* (1899) 3 Ind. Ter. 10. Although the doctrine of judicial notice is to be extended if time on the trial is saved, Thayer, Prelim. Tr. 309, yet since no great saving of time would result in the principal case, the ordinary method of pleading should be followed. The case is, therefore, correct.

EVIDENCE—OPINION OF AN EXPERT—VALUE.—The plaintiff recovered for the conversion of certain horses. On the trial, having duly qualified as an expert, he testified as to their value. His valuation only slightly exceeded that of an impartial witness. The defendant introduced no evidence. *Held*, on appeal, the plaintiff was incompetent as an expert because he had never seen the horses. *Wallingford* v. *Kaiser* (1906) 96 N. Y. Supp. 981.

Since the test of admissibility of opinion evidence is whether or not the evidence will be of assistance to the jury, Thayer, Prelim. Tr. 524, answers based on hypothetical questions are received, Wigmore, Ev. § 677; 1 COLUMBIA LAW REVIEW 180, 183, the reliance placed on such testimony being determined by the accuracy and completeness of the question, *U. S.* v. *McGlue* (C. C. 1851) 1 Curtis 1. Accordingly opinion evidence was admitted, although the witness had never seen the object, in the case of trees, *Whitbeck* v. *R. R.* (N. Y. 1862) 36 Barb. 644; shrinkage of cattle, *Mo. Pac. R. R.* v. *Hall* (1895) 66 Fed. 868; and a cow, *Smith* v. *R. R.* (1881) 80 Ind. 233. See also *Slocovich* v. *Ins. Co.* (1888) 108 N. Y. 56 and *Browne* v. *Moore* (1875) 32 Mich. 254. The fact that the witness has not seen the object goes to the weight and not the competency of the evidence. *Whiton* v. *Snyder* (1882) 88 N. Y. 299. The reversal in the principal case was therefore wrong, and especially since the defendant had not been prejudiced. *Orr* v. *Mayor* (N. Y. 1872) 64 Barb. 106; 3 COLUMBIA LAW REVIEW 433.

EVIDENCE—PRESUMPTION AS TO LAWS OF ANOTHER STATE.—The plaintiff alleged, but did not prove, that by the statutory law of Illinois proceeds of a sale of homestead property were exempt from attachment. In Iowa it was shown that by statutes and decisions such proceeds could be attached after a reasonable time. *Held*, in the absence of proof the law of another State is presumed to be the same as the lex fori. *Campbell* v. *Campbell* (Iowa, 1906) 105 N. W. 583.

In the absence of proof to the contrary, the courts presume that the common law prevails in another State, *Walker* v. *Maxwell* (1804) 1 Mass. 104; *Monroe* v. *Douglass* (1851) 5 N. Y. 447, and also equity, *Buchanan* v. *Hubbard* (1889) 119 Ind. 187, and the law merchant, *Leavenworth* v. *Brockway* (N. Y. 1842) 2 Hill 201; *Reed* v. *Wilson* (1879) 41 N. J. L. 29, and administer that law as interpreted in the State where the court is sitting. *Legg* v. *Legg* (1811) 8 Mass. 99; *Rape* v. *Heaton* (1859) 9 Wis. 328. Since, however, this rule is founded on convenience and the probability that the actual truth will be reached and is not a mere technical assumption, *Wright* v. *Delafield* (N. Y. 1857) 23 Barb. 498, it is held, by the weight of authority, that no presumption prevails that the statute laws of another State are similar to the lex fori. *Abell* v. *Douglass* (N. Y. 1847) 4 Denio 305; *Gordon* v. *Ward* (1868) 16 Mich. 360; *Murphy* v. *Collins* (1876) 121 Mass. 6. The principal case is, therefore, erroneous in so far as it relies upon the Iowa statute to raise a presumption as to the law of Illinois, and is to be regretted as continuing a doctrine which is insupportable See 1 COLUMBIA LAW REVIEW 489.

EVIDENCE—SUFFICIENCY OF PROOF—PRIOR CONVICTION IN ACTION FOR MALICIOUS PROSECUTION.—The plaintiff was convicted of obstructing a highway. On appeal he was discharged. He then brought this action for malicious prosecution. *Held*, that a prior conviction reversed on appeal is prima facie, but not conclusive evidence of probable cause. *Skeffington* v. *Eylward* (Minn. 1906) 105 N. W. 638.

At least fourteen States hold that a conviction on fair trial is conclusive evidence of probable cause, and with one or two exceptions, the actual decisions cited as contra, *Burt* v. *Place* (N. Y. 1830) 4 Wend. 591, are within the recognized exceptions of fraud and perjury. *Crescent Co.* v. *Butchers' Union* (1886) 120 U. S. 141. The principal case rests chiefly on the authority of *Nehr* v. *Dobbs* (1896) 47 Neb. 863, which extends the exceptions to include mistake of law, relying on a New York case holding that the advice of an attorney does not supply probable cause. Though mistake of law will not excuse a tort, yet where something in addition to the act, such as want of probable cause, is needed to constitute the offence, the mistake should be introduced to show that no offence was committed. Keener, Quasi Contracts, 90. Since, therefore, the decision in *Nehr v. Dobbs* is indefensible, Burdick, Law of Torts, 253, 255, the rule of the principal case is unsound. The contrary rule that the conviction is conclusive evidence is easy of application, less likely to be attended by hardship and tends to prevent a multiplicity of suits.

EVIDENCE—WIFE AS WITNESS AGAINST HUSBAND IN PROSECUTION FOR CRIME.—A husband shot and killed in the arms of his wife their infant child. He was indicted and convicted for its murder. On the trial the evidence of his wife was used against him. *Held*, such evidence should not have been admitted. *State* v. *Woodrow* (W. Va. 1905) 52 S. E. 545.

The general rule that the evidence of husband or wife is not admissible to incriminate the other is supported upon doctrines of social policy for the preservation of peaceful marital relations. *Bassett* v. *U. S.* (1890) 137 U. S. 496; Wigmore, Ev. 2228. The exception, usually limited to cases of personal violence of one upon the other, *Com.* v. *Sapp* (1890) 90 Ky. 580;

State v. *Boyd* (S. C. 1834) 2 Hill 288, s. c. 27 Am. Dec. 376 and note; but see *Dill* v. *People* (1894) 19 Colo. 469, although commonly attributed to the necessity of protecting the spouse and doing justice, *Whipp* v. *State* (1877) 34 Ohio St. 87, may also be rested upon the broad ground that where the reason for the rule fails the rule itself should not be applied. *Soule's Case* (Me. 1828) 5 Greenl. 407. In the principal case the necessity pointed out in the dissenting opinion of protecting infant children in the home and the certainty that marital peace can not be preserved by forcing the wife to be silent as to physical violence on the children by the husband clearly would justify the admission of the wife's evidence. The decision is, therefore, unsupportable. Cf. *Clarke* v. *State* (1897) 117 Ala. 1.

MUNICIPAL CORPORATIONS—SAFETY OF STREETS—ACTS OF LICENSEE.—A city issued a permit to a property owner to remove a part of his sidewalk and erect a temporary bridge. Through the defective condition of the bridge the plaintiff was injured. *Held*, the city by issuing the permit became liable for any negligence of its licensee, irrespective of notice of any defect. *Parks* v. *City* (1906) 35 N. Y. Law Jour. 49.

Though some courts have applied the general rule that a city must have notice of defects in its streets, not caused by its own act, to render it liable therefor, 2 Dillon, Munic. Corp., 4th ed., § 1024, to cases where the city authorized the making of the obstruction or excavation, *Herfurth* v. *Washington* (1868) 6 D. C. 288; *Dorlon* v. *Brooklyn* (N. Y. 1866) 46 Barb. 604, yet others hold that in such cases the city is liable for failure to take proper precautions to make such work safe, *Masterton* v. *Mount Vernon* (1874) 58 N. Y. 391; *Seamons* v. *Fitts* (1898) 20 R. I. 443, notice being unnecessary. *Dist. of Columbia* v. *Woodbury* (1889) 136 U. S. 450. The principal case while in accord with the latter view in not requiring notice goes further in making the city's liability depend not upon its own failure to take proper precautions but upon the licensee's negligence. While this extension has some support, *Godfrey* v. *City of New York* (1905) 104 App. Div. 357; *Mayor of Savannah* v. *Donelley* (1883) 71 Ga. 258, it is against the weight of authority, and, though a decision of the Appellate Division, is directly contra to a previous decision in the Court of Appeals. *Masterton* v. *Mount Vernon*, supra.

PLEADING AND PRACTICE—ENFORCEMENT BY FEDERAL COURTS OF THE PORTO RICAN LAW.—The common law action of malicious attachment was brought against the appellant in the U. S. District Court for Porto Rico. His defense was that the Porto Rican action for false attachment should have been brought. Judgment was given against him. *Held*, on appeal, that the previously existing law of Porto Rico was in force except as inconsistent with the general statutory and locally applicable law of the United States. *Perez* v. *Fernandez* U. S. Sup. Ct. Apr. 23, 1906.

It is the policy of the United States to permit the existing laws of its insular possessions to remain in force except as they contravene any of its general governmental laws. 31 Stat. at L. 79, ch. 191, § 8; see also *Kepner* v. *U. S.* (1903) 195 U. S. 100, 122. This policy pursued in the case of Louisiana, 22 Am. Law Rev. 896, obviously rests upon expediency and common justice. The decision of the principal case is unimpeachable.

REAL PROPERTY—EASEMENT—RIGHT TO SUPPORT—DUTY TO REPAIR.—An agreement was entered into whereby plaintiff was permitted to build a second story over defendant's one-story building. The plaintiff, in an equitable action, sought to compel the defendant to repair the foundation walls which had become defective. *Held*, the plaintiff's easement of support gave him no equitable right to compel the defendant to keep the foundation and walls in repair. *Jackson* v. *Bruns* (Ia. 1906) 106 N. W. 1.

An easement is a mere privilege appurtenant to the dominant estate and imposed upon the servient estate, Goddard, Easements 2, 21, and imposes no obligation upon the person of the servient owner to do anything for the benefit of the dominant tenant, *Highway Board of Macclesfield* v. *Grant* (1881) 51 L. J. Q. B. Div. 337, 359; *Pomfret* v. *Ricroft* (1669) 1 Saund. 321, 322 a; Goddard, Easements 21, his only duty being to refrain from interfering with the enjoyment of the easement. *Brill* v. *Brill* (1888) 108 N. Y. 511, 516; Jones, Easements § 822. Consequently, it is held that the servient owner is under no obligation to keep the servient tenement in repair. *Walker* v. *Pierce* (1865) 38 Vt. 94; *Pierce* v. *Dyer* (1872) 109 Mass. 374; *Colebeck* v. *The Girdlers Co.* (1876) 1 Q. B. D. 234, 243; 1 Tiffany, Real Property § 324. There being no express or implied contract to repair in the principal case, the decision is correct and well within the theory of easements. See Goddard, Easements 374; 1 Tiffany, Real Property § 324. Since the dominant owner may enter the servient tenement to make necessary repairs, *McMillan* v. *Cronin* (1878) 75 N. Y. 474; *Taylor* v. *Whitehead* (1781) Doug. 745; *Highway Board of Macclesfield* v. *Grant*, supra, his rights are amply protected.

REAL PROPERTY—EXCEPTION OF TIMBER IN DEED WITH TIME LIMIT FOR REMOVAL.—The plaintiff made a deed of land to the defendant excepting the timber as follows: "Said first party * * * reserves and still owns all timber down to a railroad tie size * * * and * * * is to have 34 months to remove" same. *Held*, all timber not removed in 34 months was property of grantee. *Adkins* v. *Huff* (W. Va. 1906) 52 S. E. 773.

It is believed the Court properly construed the words as making an exception of the timber. An owner of land may convey an estate in fee in the surface and retain an estate in fee in the minerals or timber, *Kincaid* v. *McGowan* (1888) 88 Ky. 91, or such an estate in timber may be created by direct grant. *Magnetic Ore Co.* v. *Marbury Lumber Co.* (1894) 104 Ala. 465. Although a deed conveying timber, or a deed conveying land excepting the timber, with a clause limiting the time for removal has been construed as giving an irrevocable license to enter upon the land and remove the timber, the licensee getting title only to the timber removed within the time limited, *Webber* v. *Proctor* (1896) 89 Me. 404; *Johnson* v. *Moore* (1873) 28 Mich. 30, yet the sounder view is believed to be that the time-limit clause operates only upon the duration of the right of entry and that the expiration of such time has no effect upon the title to the timber, merely making the owner liable in trespass if he enters without a renewal of the license. *Heflin* v. *Bingham* (1876) 56 Ala. 566; *Halstead* v. *Jessup* (1898) 150 Ind. 85. The principal case is opposed to this view.

REAL PROPERTY—EXECUTED PAROL LICENSE—REVOCABILITY.—Relying upon a parol license given without consideration, the defendant expended $7,000 in constructing an irrigating ditch on the plaintiff's land. *Held*, such license having been acted upon was irrevocable. *Stoner* v. *Zueker* (Cal. 1906) 83 Pac. 808.

Equity will enjoin the revocation of a parol license where the requisites for specific performance are present, namely, a parol contract, part performance, and inadequacy of damages. *McManus* v. *Cooke* (1887) L. R. 35 Ch. Div. 681. cf. *Churchill* v. *Russell* (Cal. 1905) 82 Pac. 440, a parol license to divert water, on good consideration, and part performance. Some cases have erroneously granted relief on this theory where no contract was made. *Rerick* v. *Kern* (Penn. 1826) 14 S. & R. 267, s. c. 16 Am. Dec. 497 and note, upon which the court in the principal case chiefly relied. Other cases reach the same result on the doctrine of estoppel. *Huff* v. *McCauley* (1866) 53 Pa. St. 206. But the better decisions have refused to invoke the doctrine of equitable estoppel where, as in the principal case, the effect would be to transfer a permanent interest in land. *Great Falls*

Water Works Co. v. *Great Northern R. R.* (1898) 21 Mont. 487. The decision in the principal case violates the Statute of Frauds, is without support in principle and opposed to the weight of authority. For a further discussion see 1 COLUMBIA LAW REVIEW 549; 6 Id. 280.

TORTS—CONTRIBUTORY NEGLIGENCE—LOOK AND LISTEN RULE.—In an action for damages for the death of the plaintiff's intestate, who was struck by a train at a railroad crossing, the court charged that, "when the train does not give timely warning * * * it is not contributory negligence in a traveler to go upon the track without looking and listening * * * if he exercises that prudence and care which a prudent man would exercise under the circumstances." *Held*, the charge was erroneous. *Cooper* v. *North Carolina Railroad Co.* (N. C. 1905) 52 S. E. 932.

The standard for the ordinary care, which a traveler about to cross a railroad is bound to exercise, *Continental Improvement Co.* v. *Stead* (1877) 95 U. S. 161; Beach, Contributory Negligence, § 63, has come to be that he must look and listen. *Elliott* v. *R. R. Co.* (1893) 150 U. S. 245; *Pennsylvania Co.* v. *Rathgeb* (1877) 32 Ohio St. 66; 3 Elliott, Railroads, § 1166. Consequently, many jurisdictions hold that failure to do so is negligence per se. *Aiken* v. *R. R.* (1889) 130 Pa. St. 380; *Tolman* v. *R. R.* (1885) 98 N. Y. 198; *Union R. R.* v. *State* (1890) 72 Md. 153; *Blount* v. *R. R.* (1894) 61 Fed. 375; contra, *Terre Haute etc. R. R.* v. *Voelker* (1889) 129 Ill. 540. But the ultimate question is whether the traveler has exercised ordinary prudence, so that where the circumstances tend to show that failure to look and listen was not the proximate cause of the injury, the question would be one for the jury. *Davis* v. *R. R.* (1872) 47 N. Y. 400; *Manley* v. *R. R.* (1893) 159 Mass. 493; 3 Elliott, Railroads, § 1166. The negligence of the traveler cannot be excused, however, by the negligence of the railroad, *The Toledo etc. R. R.* v. *Shuckman* (1875) 50 Ind. 42; *R. R.* v. *Houston* (1877) 95 U. S. 697, and the instruction in the principal case was properly held erroneous.

TORTS—EVIDENCE OF CONTRIBUTORY NEGLIGENCE.—In an action for negligence resulting in the death of plaintiff's intestate, the court, while holding the evidence submitted of deceased's care insufficient to go to the jury, states that less evidence on this point is required from the personal representatives of one killed by accident than from an injured party who himself brings the action. *Axelrod* v. *New York City Ry.* (1905) 95 N. Y. Supp. 72.

When the court is doubtful of the sufficiency of the evidence of plaintiff's care he will be required, in order to take the case to the jury, to state what he did and tried to do. *Schafer* v. *The Mayor* (1897) 154 N. Y. 466. The rule stated in the principal case apparently means only that in such doubtful cases, and when death has resulted, the question will be submitted to the jury, since the further evidence is unobtainable, *Schafer* v. *The Mayor*, supra; *Rodrain* v. *R. R. Co.* (1891) 166 N. Y. 280, on the principle that evidence ordinarily deemed insufficient to go to the jury may become so because no more is obtainable. See *Fitzgerald* v. *R. R. Co.* (1897) 154 N. Y. 263. A party under the burden of proof is entitled to a consideration of the case by the jury if he submits any reasonable evidence, *Commissioners* v. *Clark* (1876) 94 U. S. 278; *Henavie* v. *R. R. Co.* (1901) 166 N. Y. 280, and not otherwise, *Pinder* v. *R. R. Co.* (1903) 173 N. Y. 519; so the court's position in the principal case amounts to holding that when necessary evidence is inaccessible it would be, if obtained, favorable to the party who should produce it.

TORTS—NUISANCE TO THE COMFORTABLE ENJOYMENT OF PROPERTY IN TRADE DISTRICTS.—In a district devoted to the printing trade, the defendant established a printing machine in a house adjoining the plaintiff's residence. The operation of this machine did not appear to be unreason-

able as compared with other machines in the neighborhood, but the trial Judge found a substantial increase in the annoyance to the plaintiff, and granted an injunction. In the upper court the decree was affirmed. *Rushmer* v. *Polsue & Alfieri* (1906) 1 Ch. 234. See NOTES, p. 458.

TRADE-MARKS—TITLE OF COMIC SECTION OF A NEWSPAPER—RIGHTS OF ARTIST AND PUBLISHER.—The plaintiff had adopted and used for a number of years the words "Buster Brown" as a heading for a section of the comic supplement of their newspaper. The artist who drew the pictures for this comic section left the employ of the plaintiff for that of the defendant which then began to use the words "Buster Brown" as a title for their comic section. The plaintiff applied for an injunction for the infringement of a trade-mark. *Held*, that an injunction pendente lite would be given. *N. Y. Herald Co.* v. *Star Pub. Co.* (1906) 36 N. Y. Law Jour. 79.

By the weight of authority and the better view the title of a periodical publication may be a trade-mark. Brown Trade-Marks § 115; Hopkins, Unfair Trade, § 56. Since priority of user as a title to a comic supplement by the plaintiff is shown the injunction was rightly issued in the principal case unless the artist has rights which are inconsistent with the claim of the plaintiff. Even if it were conceded that the artist had a trade-mark in the words as designating to publishers that the pictures were drawn by him and not by some other artist, this right would not interfere with the right of the plaintiff to the words as a title to a newspaper any more than with the use of the words as a trade-mark for stockings, especially since the user in both cases began at the same time. See *Munroe* v. *Tousey* (1891) 13 N. Y. Supp. 79, reversed on another ground.

WILLS—INCORPORATION BY REFERENCE.—The testator attempted to make a will in 1902, but had only one subscribing witness. In 1904 he properly executed a "codicil to my last will and testament of 190–." *Held*, no testamentary provision in papers not properly executed and attested as a will can be incorporated by reference. *Matter of Emmons* (N. Y. 1906) 110 App. Div. 701.

The general doctrine is that an unattested document may by reference be incorporated into a will, provided it is clearly designated in the will as a then existing document, and it is shown to have been in existence at the time the will was executed, and is identified. Williams, Executors, 87. The principal case is supported merely by unsound dicta, the actual decisions in New York following the general rule. For an analysis of the New York cases and a full discussion of the present state of the law on this point in New York, see 2 COLUMBIA LAW REVIEW 148.